



REPUBLIC OF KENYA



KENYA LAW
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**Kenya Commercial Bank Limited v Obae (Civil Appeal E338 of 2022)
[2022] KEHC 10333 (KLR) (Civ) (22 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 10333 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E338 OF 2022

JN NJAGI, J

JULY 22, 2022

BETWEEN

KENYA COMMERCIAL BANK LIMITED APPLICANT

AND

KENNETH ONDIEKI OBAE RESPONDENT

RULING

1. The Appellant/Applicant has filed a notice of motion dated 25th May 2022 seeking for stay of execution in Nairobi MC CC No. E4275 of 2020 pending the hearing and determination of the defendant's intended appeal.
2. The application is based on grounds laid out in the notice of motion and supported by the affidavit of M/s Harriet Murengu, the Assistant Manager, Service Quality and Compliance of the applicant who deposes that judgment was delivered against the applicant at the lower court to the sum of Ksh.3,500,000/=. That the applicant is apprehensive that unless the orders sought are granted the respondent will proceed with execution. That considering the huge amount involved the applicant will suffer substantial loss and opportunity loss as it may never recover the decretal sum from the respondent in the event that the intended appeal is successful. That the applicant is a reputable financial institution and will be able to settle the decree in the event that the intended appeal is unsuccessful. That it is able and willing to comply with any conditions of stay that may be imposed by this court. That the application has been brought before this court without unreasonable delay as they have all along been waiting for a decree from the lower court.
3. The application was opposed by the respondent through his replying affidavit where it is deposed that the applicant has not demonstrated the nature and extent of the substantial loss that it would suffer in the event that the decretal sum is paid out to the respondent during pendency of the appeal. That the applicant has not demonstrated the applicant's inability to pay back the decretal sum in the event that



the appeal succeeds. That the application has not met the threshold required in law to merit the orders sought. That the respondent is an advocate of the High Court of Kenya running his own law firm with many years in practice and has sufficient means to pay back the decretal sum in the event that the appeal succeeds. That the applicant runs his bank account and should know better. The respondent annexed the following documents in proof of his financial capability: certified bank statement from the applicant; LSK SACCO member statements; several copies of title deeds and a business registration certificate.

4. The application was made under the provisions of Order 42 Rule 6 of the *Civil Procedure Rules* that provides that:

“No order for stay of execution shall be made under sub-rule (1) unless—

- a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

5. Arising from this rule, an applicant for stay of execution needs to satisfy the court on the following conditions before they can be granted stay orders:

- a) The application has been made without unreasonable delay,
- b) Substantial loss may result to the applicant unless the order is made, and
- c) Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

6. As regards the first condition, judgment at the lower court was delivered on 22nd April 2022 and the instant application was filed on 25th May 2022. Appeals from subordinate courts are supposed to be filed with the High court within 30 days of the delivery of the judgment, order or decree. This application was filed within the stipulated time. There has therefore been no delay in filing the application.

7. The second condition that the applicant has to meet in such an application is to show that it will suffer substantial loss unless the orders sought are granted. In the case of *Rhoda Mukuma v John Abuoga* (1988)eKLR it was stated that –

“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

8. On the other hand, the court has to bear in mind that execution as is being sought in this case is a lawful process as was emphasized by the Court of Appeal in *Machira t/a Machira & Co. Advocates v East African Standard (No.2)* (2002) KLR where the court stated that

“In this kind of application for stay, it is not enough for the application to merely state that substantial loss will result. He must prove specific details and particulars... where no pecuniary or tangible loss is shown to the satisfaction of the court; the court will not grant



stay...This legal burden does not shift to the Respondent to prove he is possessed of the means to make a refund.

9. And in the case of *James Wangalwa & Another v Agnes Naliaka Chesetoit* (2012)eKLR it was held that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

10. I have considered the issue of substantial loss and I am not satisfied that the applicant will suffer substantial loss if the prayers sought are not granted. The applicant only stated that they are apprehensive that the respondent will execute the decree. However, execution is a lawful process since the respondent has obtained judgment in his favour. The Applicant alleged that they may not be able to recover the money from the respondent but did not substantiate the allegation. On the contrary, the respondent went out of his way and annexed documents to show that he is financially capable of refunding the money to the applicant in the event that the appeal is successful. Among the documents is a bank statement from the applicant itself showing that the respondent has maintained healthy bank balances which are capable of refunding the money. Besides that, the respondent annexed some title deeds from Mavoko Municipality. In the premises the fear by the applicant that they may not recover the money from the respondent is unfounded. They have not demonstrated that they will suffer substantial loss if the orders sought are not granted.

11. The other condition is security for due performance of the decree. The applicant states that they are a reputable financial institution who are capable of paying the decretal sum in case the intended appeal goes in favour of the respondent. That they are willing to abide by any conditions that this court may impose.

12. In *Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & another* (2018) eKLR, it was stated that:

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

13. I have perused the annexed memorandum of appeal and the judgment of the lower court. The respondent who maintains a bank account with the appellant, was claiming general damages from the applicant after a sum of Ksh.378,531/= was debited from his account without his authority. The trial court awarded general damages to the tune of Ksh.3.5 million for breach of contract. It is not desirable for me to go to the merits of the case at this stage. The duty of this court at this stage is to balance the interests of the respondent who has a lawful judgment in his favour and the right of appeal of the applicant. Though the respondent has demonstrated that he is in a position to refund the money in the event that the intended appeal is successful, the order that commends itself to me is for the decretal



sum to be deposited in a joint interest earning account to be opened between the applicant and the respondent. That way the money will be available to either party depending on the outcome of the appeal. The parties are given a period of one month from the date hereof in which to open the account at a bank to be agreed upon by themselves.

14. In the premises and on the condition stated hereabove, prayer 3 of the notice of motion dated 25th May 2020 is granted that there will be stay of execution of the judgment and order in Nairobi CMCC No. E4275 of 2020 and any other orders arising therefrom pending the hearing and determination of the intended appeal.
15. Orders accordingly. Costs of the application to be in the cause.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 22ND DAY OF JULY 2022.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Chege for Intended Appellant/Applicant

Mr. Mc. Ouma for Respondent

Court Assistant- Sarah

30 Days Right of Appeal.

